

DARKO (Migration) [2018] AATA 3295 (13 July 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Sarpomaah Mingle Darko
VISA APPLICANT:	Mr John Sekeyere
CASE NUMBER:	1619440
DIBP REFERENCE(S):	BCC2015/1862789
MEMBER:	Robert Wilson
DATE:	13 July 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.211 of Schedule 2 to the Regulations; • cl.300.214 of Schedule 2 to the Regulations; • cl.300.215 of Schedule 2 to the Regulations; • cl.300.216 of Schedule 2 to the Regulations; and • cl.300.221 of Schedule 2 to the Regulations.

Statement made on 13 July 2018 at 2:16pm

CATCHWORDS

Migration – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – genuine intention to marry – NOIM – frequent visits to sponsor’s family – money transfer from sponsor – shared expenses – shared household duties – met at a social event – telephone communication – witness written evidence – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 5F

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2 cls 300.211, 300.214, 300.215, 300.216, 300.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 29 June 2015. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cls.300.215 and 300.216.
3. The delegate refused to grant the visa on 6 October 2016 on the basis that the visa applicant (the applicant) did not satisfy cl.300.215(a) or (b) as they were unable to provide evidence which allowed the delegate to reasonably establish that they had a genuine intention to marry each other nor that the marriage was going to take place within the visa period. Clause 300.216 was not met as the delegate was not satisfied the parties genuinely intended to live together as spouses. Therefore, the delegate was not satisfied that the applicant met cl.300.221 in Schedule 2 to the Regulations.
4. The review applicant (hereinafter referred to as the sponsor) appeared in person before the Tribunal on 14 December 2017, and the applicant gave oral evidence by phone. Both gave evidence and presented arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Akan (Ghana) and English languages.
5. The sponsor was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether cls.300.215, 300.216 and 300.221 are met.

Does the visa applicant intend to marry an eligible person? (Clause 300.211)

8. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. The Tribunal has noted that the applicant and sponsor have submitted a legal intention to marry (i.e. Notice of Intended Marriage, or NIM or NOIM), dated 2 July 2015 and the date of the visa application was 29 June 2015.
9. The marriage was to be solemnised on Sunday, 13 March 2016 at Quakers Hill, New South Wales. The sponsor had signed the NOIM, which is acceptable under the *Marriage Act 1961* (the Marriage Act). It was valid for 18 months. It is written in the document that, 'Should the Visa process extend beyond the date of the proposed Marriage, the NOIM will be renegotiated under the Marriage Act'.
10. On 14 December 2017 another NOIM was provided by the applicant and the sponsor in respect of a marriage to be solemnised on Saturday, 29 September 2018 at Quakers Hill,

NSW. The NOIM has only been signed by the sponsor at this stage, which is acceptable under the Marriage Act, and is valid for 18 months. The applicant will sign on his arrival in Australia. Should the visa process extend beyond the date of the proposed marriage, the NOIM will be renegotiated under the Marriage Act.

11. As the sponsor has provided her intention to marry and a copy of her Australian Citizenship document dated 1 June 2010, the Tribunal finds that the requirements of cl.300.211 are met.

12. Have the parties met and are they known to each other personally? (Clause 300.214)

13. On the basis of the oral and documentary evidence, the Tribunal is satisfied the parties have met and were known to each other personally before the visa application was lodged on 29 June 2015. Therefore, cl.300.214 is met.

14. Do the parties intend to marry? (Clause 300.215(a) and (b))

15. The Tribunal is satisfied that when the parties applied for the visa they genuinely intended to marry. Therefore, cl.300.215(a) is met.
16. The Tribunal is also satisfied that at the time of application the parties intended to marry within the visa period. In this regard, the applicant called the sponsor and told her he wanted to marry her and she agreed to his proposal. He also told his parents about their relationship and their future intention. His family officially visited her family and greeted her family as would be in-laws. The applicant frequently visits the sponsor's parents to greet them and they have accepted him in their family.
17. The applicant said, looking to the future, going to Australia is an opportunity for him and his fiancée to continue their relationship and live happily together as a couple and also begin to share finances together. Their plans include that they settle quickly and get their own property, and to have a child.
18. Therefore, they meet the requirement of cl.300.215(b).

19. Do the parties genuinely intend to live together? (Clause 300.216)

20. The Tribunal has had regard to the term 'spouse' as defined in s.5F of the Act; s.5F(2)(a)-(d), and other relevant considerations as set out in r.1.15A(3) for spousal relationships: r.1.15A(4) in assisting in determining the parties' intentions.
21. Firstly, both the applicant and sponsor indicated that their intention is still to marry.

22. The financial aspects of the relationship

23. Any joint ownership of real estate or other major assets

24. The applicant is employed in Ghana in carpentry and plumbing.
25. The sponsor is employed in a nursing home in Australia.
26. The Tribunal asked if it is a problem being in different countries. The sponsor said they were waiting on the applicant to join her here.
27. The sponsor said it was her intention in Australia to have a joint bank account with the applicant, but she did not stay in Ghana long enough to set up a joint account.

28. The applicant said they have not established a joint bank account yet.
29. *Any joint liabilities*
30. Both the applicant and sponsor stated that there were no joint liabilities or debts.
31. *The extent of any pooling of financial resources, especially in relation to major financial commitments*
32. The sponsor said they did not have any pool for anything.
33. However, the sponsor helps the applicant financially with money transfers from Sydney to Kumasi, Ghana. Evidence of these transfer documents through 'Ria' have been provided to the Tribunal. They show sums in Australian dollars (AUD) sent to the applicant in Ghana including 484 (13 December 2014), 140 (24 January 2015), 234 (14 February 2015), 140 (28 February 2015) and 140 (30 May 2015). There is also another consistent individual amount of AUD1,080 sent on 20 occasions from 13 December 2014 to 25 June 2016. Two more recent amounts sent are 28 October 2017 (AUD166.74), and 29 November 2017 (AUD329.48).
34. The applicant said that there are commitments. They do not have them at the moment but they plan to put money together for their lives.
35. The applicant referred to his plans/dreams as follows. One is to acquire property in Ghana, and see if they will come over and use it as a place to rest. He said if he is with the sponsor they will try to acquire property in Australia.
36. *Whether one person in the relationship owes any legal obligation in respect of the other*
37. The applicant does not know if he has any superannuation. He has not made a will.
38. The sponsor has superannuation with HESTA. She has not entered the applicant's name as a beneficiary. Currently her two children are on the policy. The elder is Emmanuel Anahe, and the younger is Jessica Boateng.
39. *The basis of any sharing of day to day household expenses*
40. The sponsor indicated that, at a restaurant, for example, the applicant would pay the bill. Regarding groceries, both the applicant and sponsor would go together to purchase them but the sponsor paid the bill.
41. The Tribunal gives weight to the above information.
42. ***The nature of the household***
43. *Any joint responsibility for the care and support of children*
44. The sponsor, in her application, has declared that she gained entry into Australia following her marriage to George Boateng, which began on 3 July 2007 and ended in divorce on 20 August 2012. A Divorce Order in the Federal Magistrates Court Of Australia has been provided, dated 20 August 2012. She has one child with George Boateng. The Divorce Order stated that the only child of the marriage, who has not attained the age of 18 years is Jessica Addae Boateng born on 24 August 2004. Also, at the Tribunal hearing the sponsor said she had a daughter who was 13 years of age.

45. The applicant declared in his application form that he was in a de facto relationship with Haiga Sarfo in a relationship that began on 15 January 2002 and was terminated on 14 July 2013. The applicant has stated the relationship was terminated because he did not wish to marry Haiga Sarfo. The applicant has three children: Portia born in 2003, Erica in 2008 and Rueben in 2012. They are non-migrating dependent family members.
46. The applicant stated at the hearing that he has three children who visited and went back. There is one boy and two girls.

47. *The living arrangements of the persons*

48. The sponsor gave evidence at the Tribunal hearing. She stated that in Ghana she and the applicant lived separately, she at her place, and he in his. However, she spent a lot of time at his place. The applicant stated at the hearing that the sponsor came to his place, spent a night sometimes and then she would go back to her house. In the time they were meeting and seeing each other in Ghana, the sponsor said she spent about one month and a couple of days living with the applicant. They were in Kumasi.
49. The applicant's house was on a new site, and it is a house that is similar to houses in Australia. Everything was there. It had a garage, four to five bedrooms, with separate baths and toilets for each. At the time of the Tribunal hearing, there was no furniture. There is a lounge room, kitchen and laundry. The applicant said at the hearing that he has a borehole and a pump and tanks. At the time the sponsor lived in the applicant's house with him, the applicant was on a break, but as a plumber, he would be called out to go and fix a problem and then he would come back home.
50. The sponsor said that she went at Christmas time, and the applicant said, 'Yes, December'. The sponsor said that a lot of companies were taking their break, so the applicant had a fair amount of time at home with her. The applicant said he would sleep in unless he was called to do a job. The sponsor said they would sleep in a bit.
51. They would have breakfast at home. The applicant said sometimes he made breakfast for the sponsor. The sponsor agreed with that. The sponsor stated that they might go out for lunch. On some days when they went out for lunch they would stay in town. Both of them would go for a drink and then come home.

52. *Any sharing of the responsibility for house work*

53. They shared the house work. Both helped if there was a joint thing to complete. They shared the cleaning and vacuuming. They do a lot of things together. There was no washing machine and they did the tub wash together. The sponsor did the bathroom cleaning. They did not have garbage bins at the time so they would sort it out and burn part of it. The applicant's particular job in the house was to clean the tiles in the corridor, but the sponsor would be around helping anyway.
54. There were trees in front of the house and they would sit near there for a cool breeze.
55. The Tribunal gives weight to the information above.

56. ***The social aspects of the relationship***

57. *Whether the persons represent themselves to each other as being married to each other*

58. The applicant referred to the sponsor as his partner, living together, moving towards marriage. The applicant would also say that this is the lady I am going to marry, my fiancée.

59. *The opinion of the persons' friends and acquaintances about the nature of the relationship*

60. Mr Samuel Mireku provided a statutory declaration declared on 4 March 2015. He stated that he knows the applicant, as when he visited Ghana at around the same time as the sponsor was in Ghana, he was introduced to the applicant and his family. They went out together with the sponsor for a family day out, to church and to other important programs held during Christmas time. They continued to talk on the phone after the declarant returned to Australia.

61. The declarant sincerely believes the relationship of the sponsor and her partner is very genuine and continuing because there is a strong bond he has noticed between them. This has been traditionally recognised by both parties' family members and he has seen the love expressed by both the applicant and the sponsor.

62. Mr George Asirifi provided a statutory declaration from Ghana declared in September 2015. He stated that he was born on 27 June 1974, and he is a prison officer. He is the uncle of the sponsor who is currently domiciled in Australia. He is aware that she is currently domiciled in Australia and the applicant, who is resident in Ghana, are affianced and they have decided to get married in the near future in Australia.

63. The declarant wrote that he was a witness to their courtship in Kumasi during the sponsor's visit to Ghana in December 2013.

64. The declarant stated that he is aware of their proposed marriage and he believes their relationship is genuine and continuing and they are waiting to reunite in Australia.

65. He has made the declaration to confirm and attest that he is a witness to their relationship and that the relationship between his niece the sponsor, and her fiancée the applicant, is an ongoing relationship.

66. Ms Comfort Ofori provided a statutory declaration declared in September 2015 that she is a Ghanaian by birth and nationality and she is a business woman by profession, and she is the aunt of the sponsor who is currently domiciled in Australia.

67. She wrote that she is aware of the sponsor who is currently domiciled in Australia, and the applicant who is resident in Ghana, and they are affianced and they have decided to get married in the near future in Australia.

68. She is a witness to their courtship in Kumasi during the sponsor's visit to Ghana in December 2013.

69. The declarant is aware of their proposed marriage and she believes their relationship is genuine and continuing and they are waiting to reunite in Australia.

70. She confirms and attests that she is a witness to their relationship and that the relationship between the applicant and the sponsor is an ongoing relationship.

71. Ms Rita Agyeiwaa, banker, provided a statutory declaration declared on 3 March 2015. She wrote that she knows the applicant through the sponsor. They went to Ghana in 2013 to visit family members, where they were introduced. They were invited to their place for a family get-together and other social functions.
72. The declarant believes the relationship of the applicant and the sponsor is genuine because they seemed genuinely in love and are passionate about each other.
73. Further, she thinks they should be given the opportunity that she and her husband had; they went through the same procedure about seven years ago and they are still together and have two amazing children and they are grateful to be given the opportunity.
74. Mr Paul Frimpong provided a statutory declaration in which he stated that he is a resident of Pramso in the Ashanti region of the Republic of Ghana. He is a Ghanaian by birth and nationality. He is the father of Hagar Sarfo (referred to elsewhere as Haiga Sarfo). He is the principal witness to the customary marriage that once existed between the applicant and Hagar Sarfo, which was performed in the year 2002.
75. He wrote on 31 February 2012 that there arose some misunderstandings between the couple which the declarant tried to resolve, but his attempts proved futile.
76. The two families of the couple also tried their best to resolve the problem, but all their efforts also proved futile. The marriage broke down beyond reconciliation in his presence. The marriage was therefore dissolved on 14 July 2013.
77. He swears by this oath to confirm the dissolution of the once customary marriage between the applicant and Hagar Sarfo.
78. Ms Josephine Osei provided a statutory declaration declared on 18 August 2015. She is a Ghanaian by birth and nationality. She is a nurse by profession. She wrote that the applicant is her brother.
79. She is aware that the sponsor, who is currently domiciled in Australia, and her brother, the applicant, have engaged in a romantic relationship and have decided to get married in the near future.
80. The declarant was a witness to their courtship in Kumasi, Ghana. She is aware of their proposed marriage.
81. She made this declaration to confirm and attest that she is a witness to their relationship and that the relationship between the applicant and sponsor is an ongoing relationship.
82. Mr Emmanuel Kwadwo Opoku provided a statutory declaration declared on 18 August 2015. He is a Ghanaian by birth and nationality. He is a graphic designer. He stated that the applicant is his friend.
83. He stated that the sponsor who is currently domiciled in Australia and the declarant's friend, the applicant, have engaged in a romantic relationship and have decided to get married in the near future. The declarant said that he was a witness to the courtship of the applicant and sponsor in Kumasi, Ghana. He is aware of their proposed marriage. The applicant and sponsor are in an ongoing relationship.

84. *Any basis on which the persons plan and undertake joint social activities*

85. The sponsor said at the Tribunal hearing that the applicant would always inform the sponsor of an invitation. He would ask her and almost always they would accept. Occasionally she would not go because she was tired.
86. The applicant said that he always discussed with the sponsor any invitations and he would ask, how did she feel? If she was tired, she would have a rest and he would go by himself.
87. The Tribunal gives weight to the above information.
88. The applicant and the sponsor provided a number of photographs that are in the Departmental file, including: the applicant and sponsor in Ghana together, dressing up before going out, going out to meet his parents, in the kitchen, on his verandah, after seeing his mother, and the applicant and sponsor relaxing on the verandah in Ghana.

89. *The nature of the persons' commitment to each other*

90. *The duration of the relationship*

91. The applicant and sponsor first met on 20 December 2013. They went to a traditional Ghanaian dance. She was with a few friends. The applicant was on the floor dancing. He asked if he could dance with her. At first, she was hesitant, but they went on to the floor. She went to sit down. He went to where she was, and he asked for her phone number. He asked if she could be his friend. She was a bit hesitant. She thought about it and then she said, 'OK.' She also gave the applicant her phone number.
92. He rang to find out how she was doing. She was tired because of the dance. They discussed the dance. The following day he asked if she could go out and she said okay. He came to pick her up on the second day. They sat down and had a good chat together. He asked her where she came from; where she lived.

93. *The length of time during which the persons have lived together*

94. The Tribunal asked the sponsor, When did she go and start living in his house? He asked if he invited her to his house, would she be comfortable? She said, 'Yes' and she went there. They developed a relationship. The intention of both of them is still to marry. There is no evidence of the applicant leaving Ghana from his Movement Details. The applicant and the sponsor live in different countries.

95. *The degree of companionship and emotional support that the persons draw from each other*

96. The sponsor said that she would say that the applicant is a very caring man. He has love for humanity. He cares for her, and vice versa. It is obvious when they are together that they care for each other. The applicant said that he respected the sponsor and they drew support from each other. If she was hurt, he would feel the hurt. It was a mutual understanding.
97. The sponsor stated that she has compassion for him too, she wants to marry him. He is a caring man.
98. The Tribunal has had regard to the telephone records provided which show that the applicant and sponsor are in communication over the telephone between Australia and Ghana. The Tribunal finds that they draw a degree of emotional support from one another in doing so.

99. *Whether the persons see the relationship as a long-term one*

100. The sponsor answered, 'yes'. The applicant said, 'till death do us part.'

101. The Tribunal gives weight to this evidence.

102. **Do the parties genuinely intend to live together? (Clause 300.216)**

103. The Tribunal has had regard to the term 'spouse' as defined in s.5F of the Act, and other relevant considerations as set out in r.1.15A(3) for spousal relationships: r.1.15A(4), in assisting in determining the parties' intentions.

104. The Tribunal has also considered s.5F, with the applicant and sponsor indicating orally at the hearing as follows.

105. The relationship between them is genuine and continuing, and they do not live separately and apart on a permanent basis. They want a place of permanency where they can live together. The applicant said he wants to marry the sponsor.

106. The Tribunal has also had regard to the written evidence of the witnesses, who provided solid evidence that the couple are in a genuine and continuing relationship, and they intend to reunite in Australia. Further, that they are in a romantic relationship and they intend to get married in the near future.

107. Having considered all the evidence, the Tribunal finds that at the time of application the parties did have a genuine intention to live together as spouses. Therefore, cl.300.216 is met.

108. **Do the parties continue to meet time of application requirements? (Clause 300.221)**

109. Clause 300.221 requires that at the time of decision, the applicant continues to satisfy the criteria in cls.300.211, 300.214, 300.215 and 300.216. That is, that in this instance the applicant intends to marry an Australian citizen; that the applicant and sponsor have met and are known to each other personally; that they genuinely intend to marry and intend to do so during the visa period; and that they genuinely intend to live together as spouses.

110. The Tribunal finds that the sponsor continues to be an Australian citizen at the time of decision and is satisfied that the applicant intends to marry an Australian citizen. Therefore, cl.300.211 continues to be met.

111. The Tribunal is satisfied that the applicant and the sponsor have met and are known to each other personally. The Tribunal is satisfied that cl.300.214 continues to be met.

112. The Tribunal is satisfied that when the parties applied for the visa they genuinely intended to marry, and they continue to make preparations for their marriage. The Tribunal is satisfied that the parties are aware of the requirement that they marry within the visa period and have demonstrated at hearing that they have an understanding in this regard.

113. The Tribunal is satisfied therefore that the parties continue to have a genuine intention to marry and that the marriage is intended to occur within the visa period, and finds that cl.300.215 continues to be met.

114. The Tribunal finds that the parties continue to have a genuine intention to live together as spouses, and finds therefore that cl.300.216 continues to be met.

115. Given the findings above, the Tribunal finds that the visa applicant continues to satisfy cls.300.211, 300.214, 300.215 and 300.216 at the time of its decision and accordingly, cl.300.221 is met.
116. Given all the findings combined, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

117. **DECISION**

118. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.211 of Schedule 2 to the Regulations;
- cl.300.214 of Schedule 2 to the Regulations;
- cl.300.215 of Schedule 2 to the Regulations;
- cl.300.216 of Schedule 2 to the Regulations; and
- cl.300.221 of Schedule 2 to the Regulations.

119.

120. Robert Wilson

121. Member

122.